0

DOCKET FILE COPY ORIGINAL

RECEIVED

OCT 18 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Broadcast Television National Ownership Rules	)	MM Docket No. 96-222
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8

To: The Commission

**PETITION FOR RECONSIDERATION
of UCC *et al.***

Pursuant to Section 1.429 of the Commission's Rules, the Office of Communication, Inc. of United Church of Christ, Black Citizens for a Fair Media, Center for Media Education, Civil Rights Forum, League of United Latin American Citizens, Philadelphia Lesbian and Gay Task Force, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, Wider Opportunities for Women, and Women's Institute for Freedom of the Press ("UCC *et al.*"), by their attorneys, the Institute for Public Representation ("IPR") and the Media Access Project ("MAP"), respectfully ask the Commission to reconsider in part its *Broadcast Television National Ownership Rules; Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules; Report and Order,* FCC 99-208 (rel. Aug. 6, 1999) (*"TV National Ownership Order").* Specifically, UCC *et al.* request that the Commission reconsider its refusal to apply the statutorily mandated 35% national audience reach cap to television duopolies. The refusal to count these stations toward the 35% limit runs counter to the public interest. It unjustifiably permits concentration in local ownership

No. of Copies rec'd 0+4
List ABCDE

to lead to greater domination by the media oligopolies in national markets, fails to take into account the realities of the market place, and is inconsistent with the Commission's initial pro-diversity, pro-competitive rationale for adopting the cap. Accordingly, UCC *et al.* urge the Commission to count second stations in a designated market area for the purposes of the national ownership limits.

I. THE COMMISSION SHOULD COUNT ALL ATTRIBUTABLE STATIONS IN THE SAME MARKET TOWARD THE NATIONAL OWNERSHIP CAP

The Commission should reconsider its refusal to count television duopolies toward the statutorily mandated 35% national audience reach cap. The Commission's stated goal in revising the local ownership rules was only to allow somewhat increased concentration in ***local*** ownership. *See Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules; Report and Order*, FCC 99-209 (rel. Aug. 6, 1999) ("*Local Broadcast Ownership Order*") at ¶¶57-58. However, notwithstanding its supposed intention to defer action on whether to permit greater domination of ***national*** markets pending the biennial ownership review, *see generally 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Inquiry,* MM Docket 98-35, 13 FCC Rcd 11276 (1998), the Commission has adopted §73.3555(e)(2)(ii), which provides that "[n]o market shall be counted more than once in making [the national TV ownership reach] calculation." The effect of these rules is to permit the largest TV chains in the country to increase their ***national*** footprint.

The result of the Commission's recent decision not to "double count" is best illustrated by the following analogy:

> Imagine a berry-picking contest: one player can pick berries with only one hand. The other can pick berries with two hands. Even though the two-handed player is likely to pick almost twice as many berries, the judge says this is a fair contest because each player has the opportunity to pick all the berries in the patch.

By ruling that the addition of a second TV station should not affect the calculation of a group owner's national ownership reach, the Commission is ignoring the fact that some owners get to use two hands to pick from the patch.

Allowing a change intended to liberalize ***local*** ownership rules to permit operators to expand their dominance in ***national*** video programming and advertising markets is arbitrary and capricious. The action will increase barriers to entry for new and different program providers, disadvantage new and smaller broadcasters and impair diversity in the marketplace of ideas. To recognize the additional influence which comes with operating a second station in a market, the Commission should include the second station in counting the station's national audience reach.[1] Because there will be almost no audience overlap between two commonly-owned stations, it would be entirely appropriate to attribute all TV households in the relevant designated market area ("DMA") to each station for purposes of calculating the national audience reach. UCC *et al.* believe that the Commission could rationally attribute somewhat less than 100%, but in no event reduce attribution to less than 50%, of the DMA households to a second station in a market.[2]

---

[1] A similar revision should be made for intramarket satellites and LMAs.

[2] Use of a multiplier of less than 100% would be a recognition that a second station does not double the licensee's influence. In light of the cost savings and other supposed synergies which come with common ownership, *see Local Broadcast Ownership Order* at ¶36, it is reasonable to conclude that enhanced profitability and additional news programming of a TV duopoly can easily give a broadcaster more than twice as much clout than it has with one station. Station valuations certainly reflect such an assumption; early indications are that "a duopoly will

A. The Commission Has No Authority to Raise the National Ownership Limit Indirectly by Permitting Broadcast Groups to Reach More Viewers and Escape Attribution

The Commission acknowledges that operating two stations in a local market reduces diversity and affords a broadcaster greater control over that market. *See Local Broadcast Ownership Order* at ¶ 16. The decision to permit duopolies was based on a judgment that the benefits of duopolies in some cases outweighed the detriments, and that this "warrant[ed] relaxation to some extent of our ***local*** television ownership restrictions." *Id.* at ¶37 (emphasis added).

It is of signal importance that the Commission has ***not*** found in the present record that there are material benefits from increased ***national*** ownership levels. This is an issue which Congress already addressed in the 1996 Telecommunications Act, by narrowly voting to increase the national ownership cap from 25% to 35%.[3] The failure to include duopolies in calculating the degree of broadcaster oligopoly power therefore increases the permissible degree of national ownership beyond that contemplated in Section 202(c)(1)(B) of the 1996 Act.

The Commission has improperly opened a huge loophole in "the ultimate multiple ownership regulation," a safeguard that lies at the heart of the FCC's efforts to promote diversification and protect against anticompetitive practices:

> The Commission has traditionally accorded [the national ownership limits] the highest station among its several multiple ownership regulations....[It] is the

---

end up being worth more than the combined value of the first station and the price paid for the second." *See* Elizabeth Rathbun, *Ready, set...duopoly*, BROADCASTING AND CABLE, Aug. 9, 1999, at 4.

[3] An attempt to retain the 25% ownership cap narrowly failed in a Senate floor vote. *See* 141 Cong. Rec. S. 8247 (daily ed. June 13, 1995).

> ultimate multiple ownership regulation, with all other proscriptions and exemptions occurring within the constraints it imposes.

See Amendment of Sections 73.35, 73.240 and 723.636 of the Commission's Rules Relating to Multiple Ownership of Standard AM, FM and Television Stations, 63 FCC 2d 832, 834 (1977).

B. The Commission's Rationale for Excluding Duopolies from the National Ownership Count Ignores the Realities of the Marketplace

In the *TV National Ownership Order*, the Commission concluded that the market reach of a television duopoly "will be counted only once when calculating the group station owner's national aggregate audience reach." *TV National Ownership Order* at ¶13.

The Commission justifies its ruling as follows:

> We agree...that the national ownership rule is concerned with competition and diversity on a national scale, and that dual station ownership in one market does not add to national reach, and does not affect competition and diversity on a national basis. Also, even if a licensee increases the total number of its viewers by acquiring a second station in the market, the relevant measurement is of audience reach, not of actual viewership.

See id. at ¶10.

The logic of this statement is hopelessly flawed. While audience reach may serve as a proxy for the relative power that accompanies the operation of a single station in each of many markets, it is most certainly ***not*** a "relevant measure" when two stations are operated in that market. Once duopolies are permitted, audience reach no longer measures the potential or actual power of the multi-market duopoly operators. It is implausible to claim that the ability to sell advertising on two different stations in the largest markets, and the ability to purchase syndicated programming for both stations, does not affect competition and diversity in those national markets. The investment community certainly does not agree. *See* Mermigas, *Wall Street Digs*

Duopolies, ELECTRONIC MEDIA, Aug. 16, 1999 at 1 (reporting that the new availability of duopolies has "boosted broadcasting stocks that otherwise have languished this year").

The Commission does not attempt to show otherwise, venturing only the meaningless truism that "[i]f the licensee increases its actual viewership by acquiring a second station in that market, that does not affect our audience reach calculation; the count already includes the broadcaster's new viewers...." *TV National Ownership Order* at ¶12. This simply proves that the calculation is no longer useful to measure broadcast power. Just as the hypothetical berry picking contest equates the capabilities of the two candidates, the Commission's insistence on adhering to a measure that was developed to measure potential power in an environment where an entity could own a single station, improperly assigns equal power to broadcasters that have double the capacity to obtain viewers in a community.

The Commission's decision defies rational business behavior. The goal of a duopoly operator is to reach two entirely different audiences, with zero overlap. If the broadcaster could actually reach 100% of the viewers with one station, it would not buy the second. While the broadcaster can use the two stations to help each other through cross-promotion, joint advertising sales and so forth, the broadcaster will attempt to avoid cannibalizing its own existing viewership. Thus, while the potential audience reach of the stations -- 100% of the viewers -- is the same, the proportion of viewers actually obtained is likely to be twice as large, or close to it.

The refusal to count the audience of the second station is not only at odds with the realities of the marketplace, but also inconsistent with the rationale of the 50% UHF discount.[4]

---

[4] If the Commission persists in refusing to count the audience of a second station, then it is irrational to retain the so-called UHF discount and the Commission must repeal the discount, which is under review in the biennial ownership review. *See TV National Ownership Order* at

Although UHF stations technically reach most of the audience in a typical DMA, the Commission has afforded a 50% discount as a reflection of the difficulties UHF stations face in actually getting those audiences to view them. If the Commission had only considered audience ***reach,*** UHF stations would have been entitled to little, if any discount.[5]

C. Ignoring Duopolies for the Purposes of the National Ownership Cap Runs Contrary to the Intent of the Broadcast Limits

The national ownership limits serve two important purposes: to promote diversity of ownership and to limit anticompetitive behavior. *See Amendment of Section 73.3555 [Formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations*, 100 FCC 2d 17, 23 (1984) ("*1984 Amendment*"). The failure to assign any increased influence to the second station in a market frustrates both of these longstanding goals.

This point is borne out by the history of the "household reach" measure. From the time the Commission first considered a national limitation to the time it adopted the first seven station cap, the national percentage limits were considered to be a more precise means of achieving the same goals of encouraging diversity and preventing the development of monopoly power. *See Multiple Ownership of AM, FM and Television Broadcast Stations*, 48 Fed Reg 49438 ¶¶ 7, 16, 18, 21 (1983). Thus, the station limit and the national ownership cap always had the same two

---

¶3.

[5] This point is unaffected by the prospect that the Commission might amend or eliminate the UHF discount in the biennial ownership review, MM Docket 98-35. Such a change would occur because cable, TV, market changes and other developments have eliminated the disparity between UHF and VHF stations, not that adoption of the discount was inappropriate at the time based on then current conditions.

goals, to foster diversity and curb market power and influence. *See 1984 Amendment* at 20-23.

The Commission adopted the national ownership cap on reconsideration of its *Report and Order* expanding the number of television stations in which an entity could hold an attributable interest. *See Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 74, 76 (1985). The new measure addressed the concern that a relaxation of the local ownership rules would create sudden mass consolidation within the industry, particularly in the largest and most profitable markets. *Id.* at 89. The Commission found that while it could not predict the results of a sudden rush to consolidation and restructuring of the industry, the potential negative consequences warrant a more cautious approach. *See generally id.*

Specifically, the Commission found that a national ownership cap would "temper dramatic changes in the ownership structure by the largest group owners in the markets. Alternatively, the smaller multiple owners would be given a greater opportunity to expand." *Id.* at 91. As the Commission noted, only by making such modifications could it find that relaxing the ownership rules served the public interest -- balancing the harm to diversity of increasing multiple ownership against the economic efficiencies gained. *Id.* at 88 n.39.

The concerns that motivated the Commission to adopt the national ownership rule apply equally here. The Commission has relaxed the local ownership rules, triggering a mass restructuring within the industry. Predictably, this consolidation will concentrate in the largest and most profitable markets. As the Commission found 15 years ago, this very real danger "warrants a more cautious approach." *Id.* at 89.

Counting second stations toward the national ownership cap will prevent the largest license holders from consolidating in the largest and most profitable markets. This will preserve diversity and allow entrants new to these markets to compete. While it will not entirely undo the harm done by the Commission's decision to permit duopolies, it will at least slow the consolidation and prevent the worst abuses in the largest markets.

CONCLUSION

UCC *et al.* urge the Commission to reconsider its decision in the *TV National Ownership Order*. Specifically, petitioners request that the Commission reconsider its misguided decision to ignore television duopolies for the purposes of applying the national ownership limits. The refusal to count these stations toward the 35% national limit unjustifiably permits concentration in local ownership to lead to greater domination of broadcast oligopolies in the national market, is inconsistent with the reality of the marketplace, and runs contrary to the Commission's public interest rationale for adopting the national percentage caps in the first place. Accordingly, UCC *et al.* urge the Commission to count second stations in a designated market area for the purposes of the national ownership limits.

Respectfully submitted,

Andrew Jay Schwartzman/Ae

Andrew Jay Schwartzman, Esq.
Harold Feld, Esq.
Media Access Project
1707 L Street, NW St. 400
Washington, D.C. 20036
(202) 232 - 4300

Of Counsel:

G.William W. Carmany
Law Student
UCLA School of Law

Of Counsel:
Fernando A. Bohorquez, Jr.
Graduate Fellow
Georgetown University Law Center

Angela J. Campbell, Esq.
Citizens Communications Center Project
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W., Suite 312
Washington, D.C. 20001
(202) 662-9535

October 18, 1999

Counsel for UCC *et al.*